LIBRARY
SUPREME COURT, U. S.

No. 813

Office-Supreme Court, U.S.
FILED
NOV 30 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CITY OF SCRANTON, et al.,

Appellants,

against

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

JURISDICTIONAL STATEMENT

GORDON P. MACDOUGALL,
705 Ring Building,
Washington, D. C. 20036,
Attorney for Appellants.

HARVEY GELB,
City Hall,
Scranton, Pa. 18503

HOWARD L. TOFT,
224 Market Street,
Newark, N. J.

LEON H. KEYSERLING,
1001 Connecticut Ave., N.W.,
Washington, D. C. 20036,
Of Counsel.

November 30, 1966.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	5
STATEMENT	5
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	6
I. The Court erred in its legal standards governing an interlocutory injunction	7
II. The Court erred in finding that inclusion of the New Haven Railroad in the transaction was proper	9
III. The Court erred in its analysis of railroad competition	10
IV. The Court erred in accepting the Commission's findings as to financial prospects and needed railroad capacity	13
V. The Court erred in authorizing consummation without requiring further hearings prior thereto by the Commission	16
VI. The Court erred in upholding the failure of the Commission to consolidate this merger with other proceedings	17
VII. The Court erred in adopting an erroneous view of the Requirements of Section 5(2)(b) of the Interstate Commerce Act and the National Transportation Policy	18

PAGE

VIII. The Court erred in finding the traffic protective condition to be lawful 20

IX. The Court erred in assuming that certain railroads would be included in some major railroad merger 21

X. The Court erred in not finding irreparable injury to appellants by consummation of the merger 22

CONCLUSION 25

TABLE OF CASES

CASES:	PAGE
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962)	12
Detroit, T. & I.R. Co. Control, 275 I.C.C. 455 (1950)	21
Directors of Wheeling & Lake Erie, 138 I.C.C. 643 (1928)	12
Eastern Air Lines, Inc. v. *C.A.B.*, 261 F. 2d 830 (2d Cir. 1958)	8
Georgia v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945)	21
Interstate Commerce Commission v. *Baltimore & O.R. Co.*, 152 I.C.C. 721 (1929) and 160 I.C.C. 785 (1930)	12
Mayo v. *Lakeland Highlands Can. Co.*, 309 U.S. 310 (1940)	7, 8
McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944)	12, 19, 21
Minneapolis & St. Louis R. Co. v. *United States*, 361 U.S. 173 (1959)	3
New England Divisions Case, 261 U.S. 841 (1923)	19
New York Central Securities Corp. v. *United States*, 287 U.S. 12 (1932)	18, 19
St. Joe Paper Co. v. *Atlantic C.L.R. Co.*, 347 U.S. 298 (1954)	10
Schaffer Transportation Co. v. *United States*, 355 U.S. 83 (1957)	19
Seaboard Air Line R. Co. v. *United States*, 382 U.S. 154 (1965)	3, 12
Southern R. Co. v. *United States*, 376 U.S. 93 (1964)	9
Texas v. *United States*, 292 U.S. 522 (1934)	18

CASES: PAGE

United States v. *Corrick*, 298 U.S. 435 (1936) 7

United States v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499 (1935) 20

United States v. *Lowden*, 308 U.S. 225 (1939) 18

Virginia Petroleum Jobbers Ass'n v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958) 8

STATUTES

Administrative Procedure Act, 5 U.S.C.:
1006(d) 16
1009 2

Interstate Commerce Act, 49 U.S.C.:
preceding section 1 ..... 2, 19
5(2) 18, 19, 20, 23
13a 9
17(9) 2

Judicial Code, 28 U.S.C.:
1253 3
1336 2
1398 2
2101(b) 3
2284 2
2321-25 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CITY OF SCRANTON, et al.,

Appellants,

against

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

JURISDICTIONAL STATEMENT

Appellants, City of Scranton and Township of Weehawken, appeal from the judgment of the United States District Court for the Southern District of New York, entered October 4, 1966, which denied appellants' request for an interlocutory injunction enjoining the operation of, and the taking of any steps to make effective, orders of the Interstate Commerce Commission (Commission) authorizing the merger of Pennsylvania Railroad Company (PRR) and New York Central Railroad Company (NYC).

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The majority and dissenting opinions of the three-judge United States District Court for the Southern District of New York are not yet reported. Copies of the opinions are attached as Appendix A to the jurisdictional statement heretofore filed in No. 642, Baltimore and Ohio

Railroad Company, et al. against United States of America, and are incorporated herein by reference to avoid unnecessary duplication.

The report and order of the Interstate Commerce Commission, dated April 6, 1966, are reported at 327 I.C.C. 475. The report and order of the Interstate Commerce Commission on reconsideration, dated September 16, 1966, are reported at 328 I.C.C. 304. A further order, dated September 29, 1966, setting hearings in these proceedings, is not reported, but copy thereof is attached as Appendix C to the aforesaid jurisdictional statement of the Baltimore and Ohio Railroad Company et al., to which reference is hereby made.

Jurisdiction

The action below was instituted by Erie-Lackawanna Railroad Company (E-L) on September 8, 1966 to permanently enjoin, annul or set aside orders of the Interstate Commerce Commission which approved the merger of PRR and NYC.

Borough of Freedom, City of Scranton, City of Hoboken, City of Union City, Township of North Bergen, Town of West New York, Township of Weehawken and City of Jersey City sought leave to intervene in the E-L action as parties plaintiff, which leave was granted on September 21, 1966 and on September 27, 1966.

The intervening complaints of the Pennsylvania Communities and the New Jersey Communities were brought under 5 U.S.C. 1009, 28 U.S.C. 1336, 1398, 2284 and 2321-25, Title 49 U.S.C. 1, et seq. and particularly 17(9), and the Fifth Amendment to the Constitution of the United States.

The order of the District Court, denying the requests for an interlocutory injunction by all plaintiffs and intervening plaintiffs, was entered on October 4, 1966.

Notice of appeal was filed in that court by City of Scranton and Township of Weehawken on October 28, 1966.

Jurisdiction of the Supreme Court of this appeal is conferred by 28 U.S.C. 1253 and 2101(b).

Questions Presented

1. Whether the Court abused its discretion in denying the various requests for issuance of an interlocutory injunction?

2. Whether the Court erred in holding that the Commission's decision fully complied with the directions of the Supreme Court in *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 186 (1959) and *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965)?

3. Whether the Court erred in sustaining the Commission's order of April 6, 1966, 327 I.C.C. 475, as modified by order of September 16, 1966, 328 I.C.C. 304?

4. Whether the Court erred in holding that the Commission's order contains an effective provision compelling inclusion of the New Haven Railroad and that it is strongly in the public interest to so include the New Haven Railroad in the proposed transaction?

5. Whether the Court erred in accepting the Commission's findings as to the financial prospects, traffic potential and needed railroad capacity for Pennsylvania Railroad Company and New York Central Railroad Company?

6. Whether the Court erred in approving the merger prior to further hearings by the Commission?

7. Whether the Court erred in holding that the Commission's action in not consolidating the application for the proposed merger with the Norfolk and Western inclusion case (F.D. 21510) and/or the Norfolk and Western-Chesapeake and Ohio merger case (F.D. 23832) was lawful in view of the fact that these two pending proceedings arise as a direct result of the proposed merger?

8. Whether the Court erred in approving the Commission's construction of the governing statutory standards, and that these standards had been satisfied?

9. Whether the Court erred in holding the traffic conditions contained in Appendix G to the Commission's April 6, 1966 report to be lawful?

10. Whether the Court erred in holding that the Commission has the power to fix terms for the inclusion of Erie-Lackawanna Railroad Company, the Delaware and Hudson Railroad Corporation and Boston and Maine Corporation into the Norfolk and Western Railway Company?

11. Whether the Court erred in holding that the Commission found, with ample supporting evidence, that the merger will permit more economical and efficient use of transportation facilities?

12. Whether the Court erred in holding that the estimated savings from the proposed merger have not lost their force because of the marked recent improvement in earnings for Pennsylvania Railroad Company and New York Central Railroad Company?

13. Whether the Court erred in holding that the Commission fully understood the national welfare and defense implications of its decision?

14. Whether the Court erred in not finding that appellants would have an effective judicial review of the Commission's order approving the merger upon denial of an interlocutory injunction?

15. Whether the Court erred in holding that (1) appellants failed to make a strong showing that they are likely to prevail on the merits; (2) appellants would not be irreparably injured without interim relief if they ultimately prevail; (3) that issuance of a stay to appellants would substantially harm other parties if the other parties should prevail; and (4) the public interest would be adversely affected by appellants' request for an interlocutory injunction if the validity of the Commission's order is ultimately sustained.

Statutes Involved

The following statutes are involved in this case: 28 U.S.C. 1253, 1336, 1398, 2101(b), 2284 and 2321-25; 49 U.S.C. preceding Section 1, Section 5(2), 5(b) and 17(9); 5 U.S.C. 1006, 1007 and 1009. The texts are set forth in the jurisdictional statements in Nos. 642, 680 and 691.

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York denying an interlocutory injunction against orders of the Interstate Commerce Commission which approve and permit the consummation of the merger of NYC into PRR. Appellants are City of Scranton and Township of Weehawken. City of Scranton is served by Central Railroad Company of New Jersey (CNJ), The Delaware and Hudson Railroad Corporation (D&H) and E-L; Township of Weehawken is served by E-L and NYC.

On and after September 8, 1966, nineteen plaintiffs and intervening plaintiffs brought action in the Southern District of New York seeking to set aside orders of the Interstate Commerce Commission which had approved the merger. Ten of these plaintiffs and intervenors were railroads; eight were communities located in the states of Pennsylvania and New Jersey; and one was an individual stockholder of PRR and citizen of the Commonwealth of Pennsylvania. All of the complaints sought an interlocutory injunction against consummation of the merger, pendente lite, so as to preserve the status quo during completion of judicial review of the Commission orders.

The District Court on October 4, 1966 denied these requests for an interlocutory injunction in an opinion written by two of the judges, with the third member of the panel dissenting. The lengthy opinion of the majority is devoted almost exclusively to the arguments urged by the ten railroad plaintiffs, the only mention of the eight plain-

tiff communities being as follows:

> "Shapp and the Borough of Freedom and City of Scranton also intervened as plaintiffs." (No. 642, J.S. A-7)
>
> "The complaints of Shapp and the Borough of Freedom and City of Scranton, the only parties attacking the merger as such, afford no warrant for a temporary injunction, since they fail on all of the points listed." (No. 642, J.S. A-17)

The Questions Presented are Substantial

The questions presented by this appeal are substantial and require plenary consideration for their resolution because the orders of the Commission are invalid, and because appellant communities will suffer irreparable injury and be denied effective judicial review if the merger is consummated.

The proposed merger would be the largest ever consummated in U.S. corporate history, would amalgamate $6 billion in assets, and would embrace the industrial heartland of America. The merger would have a profound adverse effect upon hundreds of communities.

The Commission, in approving the merger, has predicated the estimated savings to applicants, as well as the necessity for the merger itself, upon a prospective collapse in traffic volume for the two carriers. Thus, the hearing examiners found in their recommended report, adopted by the Commission:

> "Continuously declining traffic levels over the past years have resulted in a reduction in plant for both applicants. Their application to merge is another step in that direction and one which applicants have shown will be fruitful of operating economies in the long run." (Rec. Rep., p. 140)

The Commission emphasized in its report on reconsideration, 328 I.C.C. at p. 311:

"To postpone consummation of the merger which we approved because there is at present a high level of economic activity gambles unnecessarily and unjustifiably with the future of these lines and their ability to render essential services."

Since transportation capacity must precede economic growth and must, consistent with the National Transportation Policy, also be adequate for the national defense and the postal service, it is extremely important that the dramatic collapse of railroad facilities proposed by this merger be examined critically prior to undertaking the awesome step of consummation. The Commission projects a decline in the traffic of PRR and NYC from 89 billion ton-miles in 1965 to 64 or 71 billion ton-miles four years from now, in the year 1970. (327 I.C.C. 475, 559) Approval of the merger is based upon this decline. If, however, the demand for railroad transportation should remain constant, or increase, consummation of the merger will act to retard the entire national economy, the Eastern District, and appellants herein, because there will be inadequate railroad capacity for attainable economic performance, and this, in turn, will make such economic performance impossible.

I. THE COURT ERRED IN ITS LEGAL STANDARDS GOVERNING AN INTERLOCUTORY INJUNCTION.

The proper legal standards which should govern the discretion of the District Court in denying an interlocutory injunction are (1) Whether the showing made before the District Court raised serious questions as to the validity of the Commission's orders, and (2) Whether consummation of the merger would inflict irreparable damages upon complainants. The standards governing an interlocutory injunction are set forth in *Mayo* v. *Lakeland Highlands Can. Co.*, 309 U.S. 310, 316-17 (1940) and *United States* v. *Corrick*, 298 U.S. 435 (1936). Both cases are specifically shown in Rule 15(g) of this Court.

The District Court, however, employed the formulation described in *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958), as followed in *Eastern Air Lines, Inc.* v. *C.A.B.*, 261 F. 2d 830 (2d Cir. 1958), stating that the first decision is "frequently cited." A review of these citations, however, reveals that none of them is to be found in any decision of the Supreme Court, and that the two cases relied upon by the District Court have been employed almost entirely to deny temporary injunctions. With due respect to the status which the District Court would accord orders of administrative agencies, appellants herein submit that agencies such as the Interstate Commerce Commission should not be immune from effective judicial review, and that the cases specifically set forth in Rule 15(g) of this Court should be employed.

The District Court, elsewhere in its opinion, appears to at least recognize a more flexible test that the four criteria of *Virginia Petroleum Jobbers Ass'n*, for the majority opinion of the District Court states:

> "It is just as important that a court should not subject a valid railroad merger to unnecessary delay as that it should permanently enjoin one that does not conform to statutory standards *or temporarily enjoin one as to whose validity there are truly serious doubts which it needs time to resolve.*" (No. 642, J.S. A-16) (emphasis supplied)

In accordance with the guidelines established by this Court in *Mayo* v. *Lakeland Highlands Can. Co.*, supra, at p. 316, and cited in Rule 15(g) of this Court, the balance of this jurisdictional statement will show that the complaints of appellants herein raise serious and substantial questions as to the validity of the Commission's orders, and that the complaint and supporting papers of appellants make out a case of irreparable injury, so that the District Court abused its discretion in failing to issue the requested interlocutory injunction.

II. THE COURT ERRED IN FINDING THAT INCLUSION OF THE NEW HAVEN RAILROAD IN THE TRANSACTION WAS PROPER.

The District Court erroneously states with respect to the bankrupt New Haven Railroad:

> "There is no dispute that the provision compelling inclusion of this property, vitally needed but lacking vitality, is strongly in the public interest." (No. 642 J.S. A-20)

Contrary to the District Court, the complaint of the Pennsylvania Communities, Paragraph VII, raises the question as to the propriety of including the New Haven Railroad in the transaction, particularly on the present record as made before the Commission.

In requiring inclusion of the New Haven as a condition to the merger, the Commission has circumvented the 1958 legislation of the U. S. Congress with regard to the standards governing the continuance of railroad passenger service. Section 13a of the Interstate Commerce Act, 72 Stat. 571 (1958), is a recent expression of Congress which should be given full force and effect. *Southern R. Co.* v. *North Carolina*, 376 U.S. 93 (1964). It should not be evaded by resort to a condition in a Section 5(2) railroad unification proceeding.

Inclusion of smaller railroads as a condition for approval of a railroad consolidation has heretofore been employed in situations where the merged system would have a serious impact upon a smaller carrier. The hearing examiners recommended contrary to the Commission, and that the merged railroad herein not be held responsible for the New Haven's passenger deficits:

> "It is our view that the only logical and reasonable answer to this paradox is to provide for inclusion of N.H. but *only* to the extent necessary to protect it from the adverse effects flowing from the merger. By this,

we mean that the merged company, as a condition to approval here, shall be required to assume the burden of providing freight service over N.H. lines, the only operational area in which the merger would affect the latter's operations, but that no requirement shall be imposed upon the former, under existing circumstances, to conduct passenger operations now provided by N.H." (Rec. Rep., pp. 412-13)

The use of the PRR-NYC merger to safeguard passenger operations in New England is just the sort of merger initiative taken away from the Commission by Congress in its 1940 transportation legislation. *St. Joe Paper Co.* v. *Atlantic C.L.R. Co.*, 347 U.S. 298, 315-21 (1954)

In short, the Commission is asking communities in Pennsylvania and in New Jersey, and the business interests located thereat, to pay the expense of running deficit passenger trains in New England, and at the additional price of a loss of the benefits of competition between PRR and NYC. This is contrary to the will of Congress expressed in 1940 and in 1958.

The New Haven carried 3 billion freight ton miles in 1964, whereas the combined traffic of PRR and NYC was 84 billion ton miles in the same year. The question of whether it is in the public interest to so load the scales in favor of New England, and to force this merger upon the Middle Atlantic region, is a very serious and substantial question which will take time for a District Court to resolve.

III. THE COURT ERRED IN ITS ANALYSIS OF RAILROAD COMPETITION.

The District Court erroneously states, with respect to the requirement that the Commission estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation:

"In a report dated April 6 and served April 27, 1966,

> which fully complied with the directions of the Supreme Court in such recent decisions as Minneapolis & St. Louis R. Co. v. United States, 361 U.S. 173, 186 (1959), and Seaboard Air Line R. Co. v. United States, 382 U.S. 154 (1965), the Commission . . ." (No. 642 J.S. A-5, A-6)

Contrary to the District Court, the April 6 report does not comply with the standards of the Supreme Court. Since the lower court recognizes that the subject of competition is a crucial issue, an error of law on this point in itself would ordinarily require reversal by a reviewing court.

The Commission's criteria for appraising competition between PRR and NYC is confined to pairs of localities or geographical areas where shippers have a choice between PRR and NYC *directly*, or in which either applicant participates in routes with other carriers in competition with the other applicant and its connecting carriers. (327 I.C.C. 475, 509-10) This type of competition between PRR and NYC is known as "carrier" competition.

Completely ignored by the Commission is "market" competition between PRR and NYC. An example of market competition between PRR and NYC is competition for the transportation of coal from a mine situated solely on the PRR against the NYC serving a mine captive to that railroad. The purchaser of coal has an option of buying coal from either mine. Railroad car supply and freight rates play a decisive role in the exercise of that option.

The distinction between "market" and "carrier" competition is basic to the rate litigation of the Commission. Any volume of I.C.C. reports or issue of the *Federal Register* (Fourth Section applications in particular) will confirm this.

The error of law of the Commission is in assuming that rejection of the relevant geographic and product mar-

ket concept of *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), by this Court in a railroad merger case, *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154 (1965), now authorizes the Commission to evade transportation standards as well in its estimate of the scope and its appraisal of the effect of the curtailment of competition which will result from the proposed consolidation. (328 I.C.C. 304, 309-10)

The Commission cannot have it both ways. It cannot rely upon *Seaboard* to avoid the *Brown Shoe* criteria as was done in its April 6, 1966 report, on the basis that transportation standards are more appropriate (327 I.C.C. 475, 508-10), and then in its September 16, 1966 report on reconsideration refuse to apply transportation standards, of which market competition is the most vital to the public at large, on the theory that its power to grant antitrust immunity allows it to do whatever it pleases. (328 I.C.C. 304, 309-10) See, in particular: *Directors of Wheeling & Lake Erie,* 138 I.C.C. 643, 649; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.,* 152 I.C.C. 721, 723; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.,* 160 I.C.C. 785, 789.

There is a further infirmity in the Commission's construction of this Court's ruling in *Seaboard.* It is immaterial that interlocking directorates, reciprocity or combined purchasing power must violate the Clayton Act to be considered as an anti-competitive factor in a Section 5(2) merger proceeding. On the contrary, the decision in *Seaboard* specifically holds that it matters not that the merger might otherwise violate the antitrust laws. What is essential is that the Commission evaluate these anti-competitive matters and weigh them against other considerations. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87 (1945)

The District Court errs as a matter of law in uncritically accepting the findings of the Commission on competition to be adequate.

IV. THE COURT ERRED IN ACCEPTING THE COMMISSION'S FINDINGS AS TO FINANCIAL PROSPECTS, TRAFFIC POTENTIAL AND NEEDED RAILROAD CAPACITY.

The Commission announced its purpose in approving the merger.

> "In approving the PRR-NYC merger it is our purpose to open the way for the development of a modernized railroad system *trimmed* of unnecessary plant, *unencumbered* by service obligations *no longer responsive* to the public needs, and free and able to grow as and where the Nation's transportation requirements dictate. Mergers are not for shrinkage any more than the pruning of a fruit tree is for reducing the yield of fruit."

> "The examiners concluded that drastic relief was necessary to arrest a trend which, over a period of time, could reduce the individual applicants to perilous straits." (emphasis supplied) (327 I.C.C. 475, 496)

The contractionist philosophy underlying the merger permeates the examiners' report. Thus:

> "Continuously declining traffic levels over the past years have resulted in a reduction in plant for both applicants. Their application to merge is another step in that direction and one which applicants have shown will be fruitful of operating economies in the long run." (Rec. Rep., p. 140)

The above statement is apparently one which was expressly adopted by the Commission itself. (327 I.C.C. 475, 481-2)

The Commission states in its September 16, 1966 report upon reconsideration:

> "To postpone consummation of the merger which we

approved because there is at present a high level of economic activity gambles unnecessarily and unjustifiably with the future of these lines and their ability to render essential services." (328 I.C.C. 304, 311)

This excess capacity theme is echoed by the District Court:

"By adding financial strength and eliminating the need for duplicate facilities, the merger will promote renovation of plant needed to enable the applicants to afford better service and thereby retain or increase traffic." (No. 642 J.S. A-19)

The contractionist theory behind this merger is an invitation to an economic calamity. Because transportation facilities must precede economic development, consummation of the merger could very well precipitate an economic recession.

Approval of the merger is predicated upon a collapse in railroad traffic over the next four years. Applicants forecast to the Interstate Commerce Commission showed that combined PRR-NYC freight traffic would decline from 72.6 billion ton miles in 1961 to 69 billion in 1965, and a further reduction to 66 billion in 1970. The hearing examiners forecast an even lower figure of 64 billion in 1970. The Commission itself, in its April 6, 1966 report, projects both 64 and 71 billion ton miles for the year 1970. (327 I.C.C. 475, 559)

Contrary to the above predictions of economic disaster, Leon H. Keyserling, former chairman of the Council of Economic Advisers, projected an increase in PRR-NYC traffic from 72.6 billion ton miles in 1961 to 89 billion in 1965, and to a higher 105 billion in 1970.

The record shows that the Keyserling projection was right on target. Combined PRR-NYC traffic was 89.2 billion ton miles in 1965.

Consummation of the merger in view of the now-

discredited economic forecasts underlying the merger and, in fact, the justification for the merger, is to gamble with the economic health and military requirements of the Nation.

Competition has the natural tendency to create additional capacity because each carrier would like to be in a position to capture traffic from its competitors. Competition is extremely desirable in an expanding economy because capacity for future growth is provided. Such capacity must precede economic growth, and the lead-time necessary to build locomotives, cars, added track capacity for storage, and new yards to classify and facilitate movement is often quite substantial.

Monopoly places the decision for increased capacity in the hands of a single management rather than with the economics of the market place. It is often more profitable to obtain higher freight rates on a limited volume of traffic than it is through lower rates for a larger volume of traffic.

Not only does the finding of the Commission as to needed capacity fail—and that of the District Court as well—but so also does the correlative finding that there will be an estimated $81 million in annual operating savings. This large saving is given considerable weight by the District Court in its decision to deny the interlocutory injunction.

However, the estimated $81 million in operating savings is predicated upon the 1961 level of traffic for the two railroads. The basis for these savings was a reduction in duplicate competitive capacity so as to conform with expected lower levels of traffic. These savings have lost their validity with the 22 percent increase in traffic since 1961. Instead of a net reduction of 6,154,948 freight train miles, to be achieved by consolidating the traffic of the two carriers into lightly-loaded trains, these railroads are now running additional trains to handle the burgeoning business.

In view of the fact that the 1965 traffic data, which is of record in the Commission proceedings, completely negates the estimated $81 million savings, the District Court has abused its discretion in upholding both the traffic forecasts of the Commission and the savings to be derived from the anticipated reduction in railroad capacity.

These are serious and substantial questions warranting an interlocutory injunction pending judicial review.

V. THE COURT ERRED IN AUTHORIZING CONSUMMATION WITHOUT REQUIRING FURTHER HEARINGS PRIOR THERETO BY THE COMMISSION.

The April 6, 1966 report of the Commission takes official notice of the pending petitions of three carriers for inclusion in the N&W system, as well as the pending application of N&W and C&O for merger. The Commission further states, *explicitly*, that these two other railroad unification proceedings have a bearing on its decision in the instant PRR-NYC merger case. And the Commission, again explicitly, invited any party to proceed pursuant to section 7(d) of the Administrative Procedure Act. (327 I.C.C. 475, 487-88)

Section 7(d) of the Administrative Procedure Act (5 U.S.C. Section 1006(d) reads as follows:

> "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

Petition for further hearing was timely filed on the basis that the Commission's recitation of the facts con-

cerning these two other pending proceedings was incomplete and, in particular, that the commission omitted to state that these two other proceedings arise solely because of the proposed PRR-NYC merger and, accordingly, that the Commission is required to consider the anti-competitive effect of these other proposed mergers in evaluating the PRR-NYC merger. Having taken official notice of these two pending proceedings, and then stating that they have a bearing upon the instant decision, the failure to grant a further hearing pursuant to the invitation extended places the Commission's report and order in a very dubious legal posture.

The District Court does not come to grips with this matter, raised in paragraph VIII of the Pennsylvania communities complaint. This is a serious and substantial issue.

VI. THE COURT ERRED IN UPHOLDING THE FAILURE OF THE COMMISSION TO CONSOLIDATE THIS MERGER WITH OTHER PROCEEDINGS.

Although not mentioned in its two reports, the Commission denied petitions for consolidation of the instant transaction, with its pending Finance Docket No. 21510, et al., involving the petitions of E-L, D&H and B&M for inclusion in N&W. This matter is specifically raised in the complaint of the New Jersey communities:

The District Court states:

> "Decision whether to handle all these consolidations in one giant proceeding or in several rests in the sound judgment of the Commission subject only to its management of the various proceedings so as to promote an ultimate solution fair to the carriers and consistent with the public interest, a task in which it has displayed considerable ingenuity. (No. 642 J.S. A-17)

Appellants herein submit that the Commission and District Court have erred in approving a piecemeal approach to the Eastern railroad merger movement when (1) Important conditions to the instant merger are related to the decision in another pending proceeding, and (2) The Commission itself takes official notice of such pending proceedings in arriving at its decision to approve the merger herein.

The reliance of the District Court upon "clairvoyance" to predict the outcome of Finance Docket No. 21510, et al. warrants careful consideration by this Court.

The failure to consolidate admittedly inter-related railroad unification proceedings is a serious and substantial issue.

VII. THE COURT ERRED IN ADOPTING AN ERRONEOUS VIEW OF THE REQUIREMENTS OF SECTION 5(2) OF THE INTERSTATE COMMERCE ACT AND THE NATIONAL TRANSPORTATION POLICY.

One of the important issues raised by the Pennsylvania and New Jersey communities before the District Court is the definition of "public interest" contained in Section 5(2)(b) of the Interstate Commerce Act (49 U.S.C. 5(2)(b)), and whether the criteria of the National Transportation Policy are to be considered in railroad unification proceedings.

The April 6, 1966 report of the Commission defines the "public interest" in terms of the four criteria established by this Court in *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25 (1932), followed in *Texas* v. *United States*, 292 U.S. 522, 531 (1934) and in *United States* v. *Lowden*, 308 U.S. 225, 230 (1939). (327 I.C.C. 475, 494, 505)

This definition of the public interest, however, stems from the more limited transportation policy of the 1920

legislation. Indeed, the predicate for *New York Central Securities Corp.* is specifically shown to be the earlier opinion of Justice Brandeis in *New England Division Case*, 261 U.S. 841 (1923), wherein the policy underlying the 1920 Act was spelled out.

A fundamental error of the Commission in the instant proceeding is its failure to recognize that the Transportation Act of 1940 not only revised the carrier unification sections of the Interstate Commerce Act, but enacted a much more comprehensive transportation policy, known as the National Transportation Policy. (49 U.S.C. preceding section 1) It is this National Transportation Policy which is now the Commission's guide to the "public interest," *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82, 87 (1944). That policy is the yardstick by which the correctness of the Commission's actions will be measured. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 87 (1957).

The "public interest" does not, of course, stand still. Other legislation affecting transportation must be considered in the Commission's frame of reference. *McLean Trucking Co.* v. *United States, supra*, at pp. 79-80. Important recent legislation includes the Employment Act of 1946 (15 U.S.C. 1021), Area Redevelopment Act of 1961 (42 U.S.C. 2501), Manpower Development and Training Act of 1962 (42 U.S.C. 2571), Economic Opportunity Act of 1964 (42 U.S.C. 2701) and Appalachian Regional Development Act of 1965 (40 U.S.C. App. 2).

Proper definition and evaluation of the "public interest" requires that the 1920 standards employed by the Commission for this proposed merger be held erroneous. The reports of the Commission in this proceeding are particularly deficient with respect to national defense, postal service and employment goals. For example, in connection with the latter, the Commission holds as a matter of law that the effect of the merger upon other carriers is a proper consideration under Section 5(2)(c) of the Act in deter-

mining whether the transaction is in the public interest, but that the effect upon the employees of these same carriers is not to be considered. (328 I.C.C. 304, 313-14) Thus, although elaborate protective conditions are made to make these carriers whole for loss of traffic, their employees are to receive neither protection under Section 5(2)(f) of the Act, nor is employment to be evaluated in passing upon the transaction despite Section 5(2)(c)(4). Railroad employment is of particular concern to appellants because residing in their communities are a substantial number of employees situated on railroads which are contesting this merger, and which will suffer either a diversion of traffic or a rerouting of traffic, or both.

VIII. THE COURT ERRED IN FINDING THE TRAFFIC PROTECTIVE CONDITIONS TO BE LAWFUL.

The District Court found the special traffic protective conditions contained in Appendix G of the Commission's April 6, 1966 report to be lawful. (No. 642 J.S. A-28, A-29)

The Complaint of the Pennsylvania communities, however, questions the lawfulness of traffic conditions which eliminate the right of independent rate action within the zone of reasonableness. Appendix G provides that any new or changed freight rates which would divert or tend to divert traffic from routes presently participated in by E-L, D&H or B&M, shall be suspended and ordered cancelled. Indeed, the mere determination that either E-L, D&H or B&M is a "competitive factor" makes suspension mandatory during investigation.

This provision means that plaintiff communities will be denied the benefit of railroad competition in that freight rates otherwise within the zone of reasonableness are to be condemned. The right to enjoy railroad competition within the zone of reasonableness is fundamental in commerce law. *United States* v. *Chicago, M. St. P. & P. R. Co.*,

294 U.S. 499 (1935); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945). The Commission has heretofore imposed conditions in carrier unification proceedings so as to enhance competition. *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492. The Commission now, however, has imposed a condition which would restrict competition.

The right of independent action within the zone of reasonableness was established by the Reed-Bulwinkle amendment to the Interstate Commerce Act. 62 Stat. 472 (1948)

The Commission has not only failed to grant the public a hearing on this matter prior to imposition of the traffic condition. It has in addition failed to appraise the anti-competitive impact of this condition in evaluating whether the merger is in the public interest. *McLean Trucking Co.* v. *United States, supra.*

This is a serious and substantial issue affecting the validity of the Commission's orders.

IX. THE COURT ERRED IN ASSUMING THAT CERTAIN RAILROADS WOULD BE INCLUDED IN SOME MAJOR RAILROAD MERGER.

The Commission has not guaranteed including E-L, D&H or B&M in either the N&W system or in the proposed PRR-NYC system. All that is awarded by Appendix A.9, is an opportunity to petition for inclusion, and not that the requirements for inclusion in any merger have been satisfied. (327 I.C.C. 475, 553; 328 I.C.C. 304, 322)

The District Court errs in stating:

> "What the law requires, and what the Commission found it to require in both reports, was that the merger should not affect the viability of the three carriers between consummation and a fair opportunity for incorporation into larger systems;" (No. 642 U.S. A-28)

Appellants herein, served by one or more of the protected carriers, challenge the above formulation of law, because the Commission found that without inclusion in a major system, it is doubtful that the three protected carriers could withstand the competition of the PRR-NYC merger. (337 I.C.C. 475, 522)

There is absolutely no guarantee that E-L will be included in either the N&W system or a PRR-NYC merged system, so that there is likewise no guarantee that, for example, City of Scranton will have adequate railroad service upon the demise of E-L and D&H.

This is a serious and substantial issue running to the validity of the Commission's orders.

X. THE COURT ERRED IN NOT FINDING IRREPARABLE INJURY TO APPELLANTS BY CONSUMMATION OF THE MERGER.

The District Court held its hearing on the interlocutory injunction on September 21, 1966, two days after the September 19, 1966 release in Washington, D.C. of the Commission's report and order on reconsideration. This short interval of time did not permit appellants herein the necessary period of time in which to present affidavits for consideration by the Court. The United States requested a postponement of the hearing to allow all parties more adequate time, but was overruled by the Court. This action, in itself, is an abuse of discretion by the Court.

Nevertheless, the examiners held, and the Commission adopted, findings of injury to the broad range of communities objecting to the merger, although disposing of these communities as a matter of law:

> "It is eminently clear that neither the taxing structure, the level of employment in a given area, nor other arguments running to these essential questions bear any relationship to transportation, nor can we find any

provision of the act or in its legislative history that permits us to measure the impact of the proposed merger in relationship to such effects upon economic, political or geographic areas or individual businesses located therein. Insofar as this Commission is concerned, such effects, though none-the-less real, have no jurisdictional significance and, in our opinion, any condition whose purpose is to protect such interests cannot be imposed." (Rec. Rep., pp. 282-83)

Appellants challenge this rule of law. Nevertheless, apart from the question of considering such matters as part of the "among other" factors mentioned in Section 5(2)(c) of the Interstate Commerce Act, or as part of the "public interest" by virtue of recent legislation affecting transportation employment, it is a firm finding of fact that the numerous communities opposing the merger will be adversely affected. All the examiners can offer is:

"Certainly, we would hope that applicants in reorganizing their operations would work closely with the communities involved, so that provision can be made to cushion any adverse effect flowing from the merger to individual communities or businesses therein. Again, we believe that ample and adequate notice of the curtailment of facilities which are vitally tied to a community's economic welfare should be provided for as a basic principle of fairness." (Rec. Rep., p. 281)

The District Court has abused its discretion in failing to consider the injury facing appellants. The injury is irreparable in that there can be no compensation by an action at law if plaintiff communities prevail on the merits.

The affidavit and supporting materials presented by Leon H. Keyserling further demonstrate the irreparable injury to appellants. The former chairman of the Council of Economic Advisers has been proven correct thus far in his projections of traffic and needed railroad facilities. His

1970 projection of 105 billion ton miles for PRR and NYC is to be contrasted with the Commission's projections of 64 billion and 71 billion. (327 I.C.C. 475, 559) This is a very wide gap in estimates.

It is, of course, impossible to project with precision the exact degree of harm to any particular community by the general collapse in railroad facilities projected by the Commission. But such a wide spread in traffic projections —Mr. Keyserling being at least 50 percent higher than the Commission's data for only four years hence—cannot fail to have a serious impact upon virtually every community in the Eastern District if Mr. Keyserling should continue to be correct and the Commission's projections continue to be erroneous. Since Mr. Keyserling has been correct thus far, projecting PRR-NYC traffic to rise from 72.6 billion ton miles in 1961 to 89 billion in 1965, it is an abuse of discretion to hold that he will suddenly be wrong, and thus needed railroad facilities be abandoned or scrapped by approval of this merger.

Further recognition of injury to appellants comes from the conditions prescribed by the Commission for the smaller railroads serving appellant communities. The traffic conditions, indemnification provisions and capital loss compensation for various railroads are the subject of further hearing by the Interstate Commerce Commission which commenced October 31, 1966. However, appellant communities are to be awarded no conditions or compensation for the injury to be suffered by consummation of the merger. Rerouting of freight trains via different junctions, consolidation of facilities and diversion of traffic from one railroad to another, affect employment, real estate values, taxation base, and many other business interests in appellant communities. The smaller railroads are to be compensated in theory, but there are absolutely no conditions or indemnities provided or in contemplation for appellant communities.

The injury facing appellants is a serious and substan-

tial question. Since appellants are but members of a class of numerous communities shown in the recommended report of the hearing examiners to be adversely affected, this issue is very important.

Conclusion

For the reasons stated herein, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

GORDON P. MACDOUGALL,
705 Ring Building,
Washington, D. C. 20036,
Attorney for Appellants.

HARVEY GELB,
City Hall,
Scranton, Pa. 18503

HOWARD L. TOFT,
224 Market Street,
Newark, N. J.

LEON H. KEYSERLING,
1001 Connecticut Ave., N.W.,
Washington, D. C. 20036,
Of Counsel.

November 30, 1966.